Supreme Court, U.S.
FILED

931898 MAY 25 1994

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1993

STATE OF FLORIDA,

Petitioner,

v.

FREDRICK SMITH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
444 Seabreeze Blvd., Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR PETITIONER

QUESTION PRESENTED

Whether a criminal suspect's Fourth Amendment right to be free from unreasonable searches is violated when, after he voluntarily gives a police officer consent to search "all areas and contents" of his vehicle, the officer looks in a wallet left in the car by the suspect?

TABLE OF CONTENTS

Pages

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITATIONS iii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING PETITION 4

CONCLUSION 6

TABLE OF CITATIONS

Cases *Pages*

Florida v. Jimeno, 500 U.S. 248, 111 S.Ct. 1801, 114 LEd.2d 297 (1991) 1, 3, 4

State v. Smith, 632 So. 2d 1086 (Fla. 5th DCA 1994) . . .4

Other Authorities

Supreme Court Rule 10.1(c) 4

Fla. R. App. P. 9.030(a) 1

28 U.S.C. § 1257(a) 1

IN THE

Supreme Court of the United States

October Term, 1993

STATE OF FLORIDA,

Petitioner,

v.

FREDRICK SMITH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, FIFTH DISTRICT

OPINION BELOW

The decision of the Florida Fifth District Court of Appeal is reported at 632 So. 2d 1086.

JURISDICTION

Petitioner is seeking review of a decision of an intermediate state appellate court which interpreted this Court's opinion in *Florida v. Jimeno,* 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991). The opinion was below was issued by an *en banc* court on February 25, 1994. The Florida Supreme Court does not have appellate jurisdiction to further review the decision. Fla. R. App. P. 9.030(a). Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment to the Federal Constitution, which states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

STATEMENT OF THE CASE

While on routine patrol in Palm Bay, Florida on January 8, 1992, Officer Folsom stopped Smith's vehicle because it had a broken tail light and Smith had rolled through a stop sign (R 7-10). Officer Folsom noted some furtive movements, as if Smith and his passenger were trying to hide something (R 11). Officer Folsom obtained written consent to search **"all areas and contents"** of the vehicle (R 117). Officer Keil opened a wallet found on the front seat between where Smith and the passenger had been sitting, and found a matchbook cover containing a white powdery substance which later tested positive as cocaine (R 39).

Smith filed a motion to suppress the cocaine, which was granted by the trial court on April 28, 1992 after a hearing. The trial court found that Smith had been lawfully stopped for two traffic infractions; that Smith freely and voluntarily executed a written consent to search his vehicle; and, that Smith did not impose any limitations upon the scope of the search. However, the trial court granted the motion to suppress on the basis that the search of the wallet exceeded the scope of consent (R 104-05).

The State of Florida appealed the trial court order granting the motion to suppress to the Fifth District Court of

Appeal, which affirmed the trial court order. Pursuant to a motion for rehearing filed by the state on October 1, 1993, the court issued an *en banc* opinion on February 25, 1994. A seven judge majority determined that because Smith had testified he did not consider he had agreed to a search of his wallet when he consented to a search of the car and its contents, the trial court had correctly granted the motion to suppress on the basis of the "objective reasonableness standard" set forth in *Florida v. Jimeno,* 500 U.S. 248, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991). Three dissenting judges determined that the trial court's analysis had overlooked the specific consent to search the contents of the vehicle, and that the trial court's interpretation of even a general consent to search is in conflict with *Jimeno, supra.*

REASONS FOR GRANTING THE WRIT

Whether a criminal suspect's right to be free from unreasonable searches is violated when, after he voluntarily gives a police officer consent to search "all areas and contents" of his automobile, the officer looks in a wallet left in the car by the suspect?

The state court determined that under these circumstances, the suspect's rights were violated, because the search exceeded the scope of the suspect's consent. The state court acknowledged that the standard for measuring the scope of consent under the Fourth Amendment is that of "objective" reasonableness, i.e., what a typical reasonable person would have understood by the exchange between the officer and the suspect. *State v. Smith,* 623 So. 2d 1086, 1087 (Fla. 5th DCA 1994), quoting, *Florida v. Jimeno,* 500 U.S. 248, ___, 111 S.Ct. 1801, 1804, 114 L.Ed.2d 148 (1991). However, the court found that where the suspect testified that he did not consider that consent to search his car and its contents would include a search of his wallet which was left in the car, the search exceeded the scope of consent under the objective reasonableness test. *Smith, supra* at 1087-88. Petitioner contends that the state court misinterpreted and misapplied *Jimeno, supra,* so certiorari should be granted by this Court. *Supreme Court Rule* 10.1(c).

The question before the Jimeno Court was "whether it is reasonable for an officer to consider a suspect's general consent to a search of his car to include consent to examine a paper bag lying on the floor of the car". 500 U.S. at ___, 111 S.Ct. at 1804. Thus, under *Jimeno,* the issue is not what the individual suspect believed, but what a reasonable person, particularly a police officer obtaining the consent, believes the scope of consent to be. Assuming, arguendo, that only a general consent had been given in the instant case,

the question would then be whether it was reasonable for the officer to consider Smith's general consent to search his car to include a consent to search his wallet, which was sitting on the seat of the car. But the inquiry in the instant case does not end there, because Smith specifically consented to a search of "all areas and contents" of his car. Applying this additional fact, the question, under *Jimeno,* becomes whether it was reasonable for the officer to consider Smith's consent to a search of "all areas and contents" of his car to include consent to examine his wallet which he had left in the car.

Petitioner contends that pursuant to *Jimeno,* such belief was indeed objectively reasonable, despite the suspect's subjective beliefs. Even the dissent in *Jimeno* recognized that the solution to the problem of determining the scope of a general consent could be solved by the police simply asking the individual for permission to search both the car and any closed containers found inside. The police in the instant case obtained consent to search the car and its contents, which is sufficient authorization for a search of a wallet left in the car. Smith never excluded personal belongings from the consent, nor did he remove the wallet from the car as he was certainly free to do.

Under the state court holding, a voluntary consent to search a car and its contents does not extend to whatever a suspect "did not consider" would be searched. This "subjective belief" standard is contrary to this Court's "objective reasonableness" standard set forth in *Jimeno, supra,* and if allowed to stand, will seriously hamper law enforcement's ability to obtain evidence from consent searches.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court grant summary review and summarily reverse the opinion of the District Court of Appeal, Fifth District, State of Florida.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
444 Seabreeze Blvd., Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR PETITIONER

No. _____

IN THE

Supreme Court of the United States

October Term, 1993

STATE OF FLORIDA,

Petitioner,

v.

FREDRICK SMITH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA DISTRICT COURT OF APPEAL, FIFTH DISTRICT

APPENDIX

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

KELLIE A. NIELAN
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
444 Seabreeze Blvd., Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR PETITIONER

INDEX TO APPENDIX

EN BANC OPINION OF FIFTH DISTRICT
COURT OF APPEAL RENDERED
FEBRUARY 25, 1994 . . . . . A-1

TRIAL COURT ORDER RENDERED
APRIL 28, 1992 . . . . . A-9

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIFTH DISTRICT

STATE OF FLORIDA,

Appellant,

Case No. 92-1097

FREDERICK SMITH

Appellee.

_____/

Opinion filed February 25, 1994

Appeal from the Circuit Court
for Brevard County,
Martin Budnick, Judge.

Robert A. Butterworth, Attorney General,
Tallahassee, and John W. Foster, Jr.
Assistant Atty Gen., Daytona Beach,
for Appellant.

James B. Gibson, Public Defender and
Anne Moornam Reeves, Assistant Public
Defender, Daytona Beach,
for Appellee.

ON MOTION FOR REHEARING EN BANC

GOSHORN, J.

We grant en banc review, withdraw our opinion filed September 17, 1993, and substitute the following in its stead.

The State of Florida appeals the order of the trial court granting appellee's motion to suppress. At issue is the correctness, *vel non,* of the trial court's determination that the search of appellee's wallet exceeded the scope of his consent to search. In *Florida v. Jimeno,* ____ U.S. ____ 111 S. Ct. 1801, 1803-04, 114 L. Ed. 2d 297 (1991), the Supreme Court, citing *Illinois v. Rodriguez,* 497 U.S. 177, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990), and *Florida v. Royer,* 460 U.S. 491, 103 S. Ct. 1319, 75 L. Ed 2d 229 (1983), held:

> The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of "objective" reasonableness -- what would the typical reasonable person have understood by the exchange between the officer and the suspect?

The Court explained that the scope of a search is generally defined by its expressed object. *Jimeno,* 111 S. Ct. at 1804.

According to the uncontroverted testimony of the appellee, the officer's stated reason for requesting the consent to search was that one of the officers had seen the passenger move as if he were putting something under the seat of the car. The officers similarly testified at the suppression hearing that they were concerned the passenger had placed something under the seat. However, the wallet in question was not found under the car seat. The appellee testified that despite his consent to search the car and its contents, he did not consider that in agreeing to permit a search of the car and its contents he gave the officers permission to search his wallet because that was "his personal belongings." The trial judge, as the finder of fact, obviously found this testimony credible.

Utilizing the *Jimeno* "objective reasonableness" standard, the trial court held that the search of the contents of the appellee's wallet exceeded the scope of the appellee's consent. The trial judge's ruling comes to us clothed with the presumption of correctness. *Smith v. State,* 378 So. 2d 281

(Fla. 1979); *State v. Hardy,* 610 So. 2d 38 (Fla. 5th DCA 1992), *review denied,* 621 So. 2d 433 (Fla. 1993). We should not reweigh the evidence and substitute our factual findings for that of the trial judge. We must affirm unless it can be concluded that the trial court's determination was *clearly erroneous* under the totality of the facts in this case. *See Davis v. State,* 594 So. 2d 264 (Fla. 1992). The totality of the facts in this case do not support such a conclusion. The order of the trial court granting the appellee's motion to suppress is affirmed.

AFFIRMED.

DAUKSCH, PETERSON, DIAMANTIS, and THOMPSON, JJ., concur.
GRIFFIN, J., concurs and concurs specially, with opinion in which DAUKSCH, J., concurs.
HARRIS, C.J., dissents, with opinion in which COBB and SHARP, W., JJ., concur.

GRIFFIN, J., concurring specially.

I concur in the opinion of Judge Goshorn but would make one further observation. Judge Harris reasons that when Mr. Smith signed a consent to search the "contents" of his car, the only relevant inquiry became whether the wallet was "contained" in the car. No matter what the circumstances surrounding the stop, no matter what the item, no matter what the signor believed or understood, no matter what statements or representations were made by the police to obtain consent, the text of the consent form controls absolutely. Judge Harris finds this to be consistent with *Jimeno;* in my view, it is contrary to *Jimeno.* The *Jimeno* test is what a typical, reasonable person would have understood by the exchange between the officer and the suspect. *Jimeno,* at 1803-04. I presume "exchange" means the series of communications by which the officer seeks consent and the citizen gives consent. As required by our supreme court

in *Davis v. State,* 594 So. 2d 264, 265 (Fla. 1992), the lower court made a determination about the scope of the consent given in this case by evaluating the totality of the circumstances. There is no basis to gainsay his judgment.

DAUKSCH, J., concurs.

HARRIS, C. J., dissenting. Case No: 92-1097

Frederick Smith was stopped because of a traffic infraction. Upon request, he consented (in writing) to a search in the following language:

> I hereby consent to a search without warrant... of *all areas and contents* of the below described...vehicle... [Emphasis added.]

Although Smith had exited the vehicle at the time of the search, he left his wallet lying on the seat. A small amount of cocaine was found in his wallet. The trial court found that the search of the wallet exceeded the scope of the above cited consent. I would reverse.

The trial court's reasons for suppressing the evidence were because "prior to the search of the wallet, the officers had no cause to believe that it contained contraband" and because the court was concerned about the scope of the defendant's consent:

> Then we get to the issue that really concerns me the most and that's the scope of the consent. The language of the consent would seem to limit it to the interior of the car and I'm not comfortable that the interior of the car would apply to and expose to search his private property, namely, the wallet. Maybe other private property such as stems, pipes, cans, residue, I think maybe those things would not be protected because they're obvious in

> their nature, but a wallet in and of itself should not — should not normally indicate criminality.

Even though the court, as indicated in the quote above, clearly stated the basis for its ruling, the majority, with no record support, has attributed to the trial judge the finding that the search exceeded the scope of the consent because the officer searched on top of the seat instead of under the seat. The majority arrives at this conclusion because the officer's suspicion was aroused when he saw a "passenger move as if he were putting something under the seat.

The majority does not contend that even Smith testified that the officer asked to search *only* under the seat. The majority has totally misinterpreted *Jimeno*[1] by finding that the stated *reason for wanting to search* limits the scope of the consent actually given to search.

The "exchange between the officer and the suspect" as it relates to the *scope of consent* (as opposed to the reason the officer asked for consent to search) is set out in writing and is before this court. Unlike the majority, the trial court specifically found that the consent covered the "interior of the car" and not only that limited space beneath the seat.

Because I find it more appropriate to respond to the trial court's expressed reasons for its rulings (rather than those attributed to it by inference), I will address the trial court's analysis.

There are two problems with this analysis. First, it ignores the specific authority to search the contents of the vehicle. Second, since a paper sack (not unlike a wallet) "in and of itself" does not normally indicate criminality, it is apparent that the trial court's interpretation of even a general consent authority to search is in conflict with United States Supreme

---

1 *Florida v. Jimeno*, ___ U.S. ___, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991).

Court's decision in *Jimeno*. Yet we are required by article I, section 12 of our state constitution to construe the law on search and seizure "in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Art. I, § 12, Fla. Const. The case most applicable to the instant facts, although admittedly not directly on point, is the *Jimeno* decision. In *Jimeno,* the Supreme Court upheld the search of a closed paper bag found in the passenger compartment of a vehicle based on the defendant's general consent to search his car. The court held:

> The Fourth Amendment is satisfied when, under the circumstances, it is objectively reasonable for the officer to believe that the scope of the suspect's consent permitted him to open a particular container within the automobile.

Jimeno, 111 S.Ct. at 1803.[2] In determining whether the officer's belief regarding the scope of the consent is "objectively reasonable," the Court stated that the scope of a search is generally defined by its expressed object. In *Jimeno,* the officer expressly informed the suspect he would be searching for drugs. The Court noted that a reasonable person would know that drugs would not be strewn across the trunk or floor of a vehicle (or limited to the space under the seat). Therefore, because the defendant knew the officer was looking for drugs but still did not place any restriction on the search, it was reasonable for the officer to believe that the scope of the suspect's *general* consent included a search of any containers in the car which could conceal drugs. The authority to search areas other than under the seat as well as containers found within the vehicle is even more apparent when the consent specifically authorizes the search of *all areas and contents* of the vehicle.

---

2 Notice that it is the officer's "objectively reasonable" understanding of the scope of the consent, not the suspect's, that is important.

The *Jimeno* court held:

> A suspect may of course delimit as he chooses the scope of the search to which he consents. But if his consent would reasonable be understood to extend to a particular container, the Fourth Amendment provides no gounds for requiring a more explicit authorization.

111 S.Ct. at 1804.

The consent actually signed by Smith[3] and before this court does not limit the officer's authority to search only the

---

3 It is sufficient response to the criticism contained in the concurring opinion to merely state the obvious. The law to be appelied in any particular cause depends on the facts and the issues of that case. If the stop had been illegal, then the consent would have been invalid. If the consent had been obtained by fraud or duress, it would have been unenforceable. If the consent had been ambiguous, it would have been construed in favor of Smith. But these are not the facts of *this* case. The trial court specifically found that the stop was legal and that the consent was voluntarily and knowingly given. The consent itself is a model of clarity. The issue considered by the trial court was whether the scope of this valid consent to search all areas and contents of the vehicle was exceeded when the officers searched the wallet (admittedly found on rather than under the seat) because (1) there was no probable cause to request the search and (2) the wallet, in and of itself, did not indicate criminality.

Smith did not state that he did not understand the language of the consent, but only that he signed the consent because he had no choice. The trial court disagreed:

> The consent was at least tainted by threats against the defendant *according to him* that car would be searched anyhow which is contradicted by the officer. But further than that, the consent was given and appears to be a valid consent. He gave it a lot of consideration. He talked to his buddy about it, his buddy who had better experience than him apparently and who advised him not to sign it. In the face of that kind of advice he decided he was going to sign it anyhow.

As I said, whether that's because he was threatened, we're going to do it anyhow, I have no way to know and I'm going to say I'm going to rule against that at this point. I'm going to believe the officers version that he did not threaten him with an illegal search.

area under the seat nor does it prohibit the search of the contents of the vehicle. For this reason, and under the authority of Jimeno, I would reverse the suppression order and remand for further action.

COBB and SHARP, W., JJ., concur.

IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR BREVARD COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

Case No.: 92-728-CF-A-T

vs.

FREDRICK SMITH

Defendant.

ORDER

This cause came upon the Defendant's Motion to Suppress on April 14, 1992. After having heard the testimony of witnesses, reviewed the exhibit(s), and hearing arguments from counsel, the Court finds as follows:

1. Officer Foskey lawfully stopped the Defendant for two traffic infractions. *Velez v. State,* 554 So.2d 545 (Fla. 5th DCA 1989).

2. The Defendant freely and voluntarily executed a written consent to search form for his vehicle. *U.S. v. Garcia,* 890 F.2d 355 (11th Cir. 1989)

3. The Defendant did not impose any limitations upon the scope of the search.

4. The officers located the Defendant's wallet, upon the front seat of his vehicle, opened it and discovered cocaine concealed in a matchbook within the wallet.

5. Prior to the search of the wallet, the officers had no cause to believe that it contained contraband.

WHEREFORE, the Court hereby ORDERS AND ADJUDGES:

A. The officers' search of the Defendant's wallet exceeded the scope of the consent granted by the Defendant.

B. Defendant's Motion is GRANTED, whereby the cocaine in this case is SUPPRESSED.

DONE and ORDERED in Chambers at Melbourne Courthouse, Brevard County, Florida, this ____ day of ____ 1992.

HONORABLE MARTIN BUDNICK
CIRCUIT COURT JUDGE

cc: State Attorney's Office – Melbourne
Attn: Craig Rappel, ASA
via courier

Public Defender's Office – Melbourne
Attn: George McCarthy, APD
via courier